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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 254

GUY F. CANNATELLA,
Petitioner

vs.

COMMONWEALTH OF VIRGINIA,
Respondent

Petition for a Writ of Certiorari to the Supreme Court of Appeals for the State of Virginia

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BRIEF FOR THE PETITIONER

To the Honorables, The Chief Justice and Associate Justices Of The Supreme Court Of The United States:

Petitioner Guy F. Canatella prays that a Writ of Certiorari issue to review the opinion of the Supreme Court of Appeals for the State of Virginia, entered on April 24, 1961.

OPINION BELOW

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 24th day of April, 1961.

Record No. 5251

GUY F. CANNATELLA, *Plaintiff in error,*

against

COMMONWEALTH OF VIRGINIA, *Defendant in error.*

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of Fairfax County on the 14th day of April, 1960.

This day came again the parties, by counsel, and the court having maturely considered the defendant in error's motion to dismiss and the plaintiff in error's reply thereto and motion for leave to pursue his second assignment of error, and being of opinion that the evidence necessary to a decision of the issues presented is not a part of the record, it is therefore adjudged and ordered that the writ of error and supersedeas heretofore awarded be, and the same is hereby, dismissed at the cost of the plaintiff in error, and the case stricken from the docket.

Mr. Justice Carrico took no part in the consideration or decision in this case.

Which is ordered to be certified to the said circuit court.

A copy, Teste:

/s/ H. G. Turner
Clerk

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 Section 1254 (1), U.S.C.

The judgment of the Circuit Court of Appeals was entered on April 24, 1961

QUESTIONS PRESENTED

(1) Where petition for writ of error was filed, followed by opposition which put in issue for judicial determination the questions involved had the Commonwealth of the State of Virginia by joining issue waived and forfeited its right to move for a dismissal upon the ground that a transcript of testimony was allegedly inaccurate.

(2) Where a document, admittedly taken from a tape recording of proceedings held upon trial it is offered as a transcript, may such transcript be summarily rejected for the reason that it is not totally accurate without any showing that it does not substantially reflect the proceedings and evidence?

STATEMENT

Heretofore, and as narrated in the Statement of Material Proceedings set forth immediately, *infra*, this petitioner filed with the Court below—this being the Supreme Court of Appeals for the State of Virginia—a petition for writ of error therein. This petition alleged in substance that in a criminal case heard by the Circuit Court for the County of Fairfax, State of Virginia, he was tried and convicted of a criminal offense and that the proceedings in said Court were in derogation of the right to a fair trial under due process of law as guaranteed him by the Constitution of the United States.

STATEMENT OF MATERIAL PROCEEDINGS

At the January 1960 Term of Court in Fairfax County, Virginia, the plaintiff in error (defendant below) was indicted by the Grand Jury of that County for Violation of Title 18, Section 180, Code of Virginia (1950).

The indictment charged that on the 10th and 20th days of June 1959, the plaintiff in error, did unlawfully, feloniously, knowingly, and designedly, falsely represent and

pretend to Phillip C. Geraci, that if he, Geraci, paid $250.00 to said plaintiff in error, plaintiff in error would construct, have constructed, and do everything necessary to construct a basement entrance, and Geraci relying upon the said representation did then and there pay to plaintiff in error the sum of $250.00, which sum was feloniously obtained.

The plaintiff in error pleaded not guilty to the charge and elected to be tried by a jury. A jury was paneled and the plaintiff in error was tried and convicted. A sentence of three years was imposed by the jury. Plaintiff in error, through his counsel, moved to set aside the verdict as being contrary to the evidence and the law, the motion was denied by the Court below, to which denial the plaintiff in error excepted. Thereafter, the trial court entered a judgment of conviction and suspended execution of sentence for sixty days to permit plaintiff in error to file notice of appeal and assignment errors. A motion for new trial in writing was filed by trial counsel, but the same appears not to have been orally argued. Pursuant to Rule 5.1, Section 4, the defendant, now the plaintiff in error, filed notice of appeal and assigned the following errors:

"1. The court erred in denying Defendant's motion to set aside the jury's verdict since a review of the entire record shows that it was contrary to the law and to the evidence presented.

2. Defendant was denied due process of law during the trial since his position as an officer of the corporation, and that of his trial counsel as the corporation's counsel was greatly prejudicial to his case, and such as to have caused a grave miscarriage of justice, which is seen on the entire record."

QUESTIONS PRESENTED BY THIS APPEAL

(a) Was the testimony of Phillip C. Geraci and Katherine R. Geraci, victims of this alleged fraud sufficiently

good so as not to create a reasonable hypothesis of doubt in favor of the plaintiff in error?

(b) Can an indictment stand, where the name of the injured party has been completely omitted, and in substitution thereof, an entirely different party has been inserted?

As will be noted from the Record sent here from the Court below, the appellant filed in due time and in proper form a petition for writ of error.

It will further appear from the Record transmitted by the Court below to this Court that the Commonwealth of Virginia, speaking through its duly elected and qualified State's Attorney, filed a brief in opposition.

On page 20 of the Record certified by the Court below to this Court appears the notation that the brief in opposition was received August 23, 1960 by a person identified in longhand as H.G.T. The Clerk of the Supreme Court of Appeals of Virginia is Howard G. Turner, Esquire.

A proper record from the Circuit Court of the County of Fairfax, Virginia was transmitted to the Appellate Court for the State of Virginia, and this includes a transcript of testimony described officially as Testimony of Witnesses. This document comprises 272 pages and purports to set forth the testimony and evidence received by the Trial Court in its adjudication of the cause.

Thereafter on February 3, 1961, as per Certification of Service as shown on page 42 of the Record from the Court below, the Attorney General for the State of Virginia filed a supplemental pledge designated as a Motion to Dismiss alleging that the transcript of testimony submitted by the Appellant below had no legal existence and that therefore the writ of error theretofor granted should be vacated and the appeal dismissed.

The Appellant below filed a reply to the motion to dismiss and thereafter Counsel for the Appellant below and for the Commonwealth of Virginia filed written arguments in the cause.

On April 24, 1961 the Supreme Court of Appeals for the State of Virginia entered its order striking the case from its docket, for the reason that the evidence necessary to a decision of the issues involved was not part of the record submitted to that Court.

The foundation upon which the Appellant Court rested its decision appears at pages 44-46 in the record transmitted from the Court below and is set forth below, in toto:

H. Miller)
Wright Building)
Vienna, Va.) in handwriting
Counsel for Defendant)

I, Harry Carrico, Judge of the Circuit Court of the County of Fairfax, State of Virginia, do hereby certify that the foregoing testimony was duly taken before me at the time and place hereinabove set forth.

Given under my hand this day of 1960

Judge

• • • •

Tendered to me this 10th day of June, 1960.

(in handwriting)

The within transcript was tendered to me on the 10th day of June, 1960.

I do not certify that the transcript is authentic. There are numerous errors in material testimony and numerous omissions of material testimony. I have made no changes

in the transcript because upon tendering it to me, counsel for the Defendant asserted that it was authentic, and that she intended to stand on it as tendered.

The transcript purports to be the testimony and other incidents of trial as taken from a tape recorded by a device operated at the trial by Ernest N. Hudgins, a member of the local bar, who represented the Defendant at the hearing and who has since withdrawn as counsel for the Defendant. Mr. Hudgins was not sworn to record the proceedings accurately, as he made no reference to the device at the beginning of the hearing, and did not advise me that he intended to use it for the purpose of recording the testimony and thereafter preparing a written transcript.

The recording device was not in operation on numerous occasions throughout the trial. Consequently, not all of the testimony and other incidents of the trial are set forth in the transcript. In many instances, questions and answers are shown in the transcript as being "unintelligible" or that "no reply was heard." All questions and answers were heard by me and I cautioned witnesses to speak in a voice loud enough so that they could be heard by the jury.

The testimony set forth on pages 74 to 81, shown in the transcript as being the testimony of Mrs. Edna Howard, is in fact the testimony of Charles Hitaffer. The testimony set forth on pages 83 to 89, shown in the transcript as being the testimony of Charles Hitaffer, is in fact the testimony of Rudolph W. Schlamann.

The tapes recorded at the trial have not been offered to or made available to me.

I do not certify that reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the original or a true copy of it was given to the Commonwealth's Attorney, inas-

much as he objects to such notice, as set forth in a statement filed with me by him on June 15, 1960.

/s/ illegible—looks like Harry L.
Judge.

(and I assume last name is Carrico, since typed in elsewhere)

June 21, 1960

ARGUMENT

It will be observed that in this cause, the trial judge certified that the purported transcript of testimony contained errors and that he refused to certify that the transcript was authentic.

It is significant that no claim was made stating that the purported transcript did not present the claim of Appellant below in such a manner and fashion as to permit a full and proper adjudication of his said claim.

The cause presented the unusual circumstance wherein the Trial Court, notwithstanding his refusal to designate the transcript as authentic—a term which can very easily mean to the user something which is beyond the understanding of any other person or party—did not assert the transcript failed to substantially present the questions involved.

The fundamental demand of justice is that a purported transcript shall present to an appellate court a sufficiently accurate and adequate presentation of the proceedings under consideration to enable such appellate court to comprehend and understand the proceedings involved to the end that a just determination of the issues may be had.

There is nothing in the record below which indicates that the transcript submitted was not adequate for such purposes.

There is no claim made that the record failed, substantially, to present the case heard in the Trial Court.

There is nothing in the Record to indicate that the Trial Court or the Commonwealth of Virginia ever sought or desired to have the matter settled before the Trial Court by means of a proper judicial inquiry.

The Record reveals only that because there were mistakes, not alleged to substantially affect the integrity of the record that it should be forthwith rejected and that for such reason the Appellant below should be deprived of his day in court in a proceeding which more nearly resembles a drumhead court martial than an enlightened civil consideration of the matter involved.

Judges, State or Federal, are not umpires or moderators whose only concern with litigation is to see that there is a rigid obedience to inflexible rules.

The judicial officer is vested with what is commonly termed discretion. Discretion envisions a mental operation which demands of the judicial officer not only to look but to see what is transpiring before him. It demands not only that he shall hear but that he shall heed and comprehend the cause and effect of testimony and evidence. It demands that he shall administer justice not as a form or a stereotyped ritual but that he shall weigh and evaluate the proceedings in their entirety and then arrive at a conclusion based upon certain justice.

If he finds that a part of a Record, such as the purported transcript here, contains errors which are merely superficial, it is his judicial duty and obligation to bring the parties and the Record before him and to conduct a hearing for the purpose of determining whether or not a proper Record on appeal can be settled.

If he fails, neglects, declines or refuses to perform this judicial duty, he has deprived the citizen litigant

of the right to a fair trial under due process of law, just as much as a police officer who raids a citizen's home absent the authority of a search warrant violates constitutional processes.

The situation is starkly portrayed in the pleadings filed with the Supreme Court of Appeals for the State of Virginia, as follows:

"The plaintiff in error was represented at the time of the commencement of his appeal by Mrs. Lois H. Miller, who was employed on May 16, 1960 (R. 30) and succeeded the attorney who represented the plaintiff in error in the trial court. It is obvious from the transcript that counsel who represented the plaintiff in error in the trial of his case below should have been a witness on behalf of the plaintiff in error and should not have undertaken the representation of him in the trial court.

ARGUMENT

Transcript Has Become A Part Of The Record

Defendant in Error is estopped to deny transcript is a part of the record.

"Counsel for the defendant in error relied upon and made numerous references to the transcript in the Statement of Facts in Brief in Opposition to Petition for Appeal to support his statements of the facts as is shown on Pages 7, 8, 9 and 10 of said brief.

"It is submitted that the transcript is a part of the record but even if it had not become a part of the record the defendant in error by its own acts is estopped to deny that it is a part of the record and has waived any objections that it may have to same being a part of the record. The defendant in error should not be permitted to use the transcript as a part of the record as was done when it was to its interest and later complain when

it becomes to its advantage to do so that the transcript is not a part of the record.

"In *Town of Falls Church* v. *Mayes*, 187 Va. 110, the court stated at Page 117 in part as follows:

> "In other words, an attorney cannot contend before the trial court that certificates of exception had been properly certified by the trial judge and contend in this court that they had no notice of the time when and the place where the certification would be made. See *Grimes* v. *Crouch*, 175 Va. 126, 7 S. E. (2d) 115."

"Rule 5:1, Sec. 3(f), has been complied with.

"Rule 5:1, Sec. 3 (f), provides how a transcript or statement not signed by counsel for all parties becomes a part of the record and counsel for plaintiff in error will attempt to discuss the compliance with said rule by dealing with the rule sentence by sentence.

"Rule 5:1, Sec. 3 (f), first sentence, is as follows:

> "Such a transcript or statement not signed by counsel for all parties becomes part of the record when delivered to the clerk, if it is tendered to the judge within 60 days and signed at the end within 70 days after final judgment."

"The transcript was tendered to the Judge of the Trial Court on the 10th day of June 1960, which was the 57th day after the entry of the judgment complained of as is shown by notation made on Page 273 of transcript and memorandum attached to transcript and this fact is not questioned in Motion to Dismiss.

"It is submitted that the transcript was signed at the end by the Judge of the Trial Court within 70 days after final judgment, the final judgment being on April 14, 1960, and the second page of the memorandum prepared by the Judge of the Trial Court and attached to the transcript having been signed by him and dated June 21, 1960. It is customary for the judge of the Trial Court

to sign the certificate or memorandum attached to the end of the transcript by the stenographer preparing the transcript but in this case the Hon. Trial Judge did not desire to sign the certificate so prepared and prepared his own memorandum which he attached to the transcript and signed as aforesaid.

"It is submitted that, if the transcript was properly tendered to the Trial Judge within the 60 days and was not signed by him within the 70-day period after final judgment, the failure of the Trial Judge to sign the transcript does not prevent it from becoming a part of the record. The Honorable Court of Appeals of this State has on numerous occasions passed upon the effect of the failure of the Judge of a Trial Court to sign or certify Bills of Exception and has held that the failure of the Trial Judge to sign or certify a Bills of Exception does not prevent the Bills of Exceptions from becoming a part of the record and we submit that the same rule is applicable to transcripts of testimony.

"In *Lancaster* v. *Stokes*, 119 Va. 149, the ruling of the court regarding the signing of Bills of Exception is concisely stated in head note No. 4 on Page 149 as follows:

> "Where a proper bill of exception was tendered to the judge for his signature within the time prescribed by law, but was not signed until the expiration of such time, it will be held to be a part of the record as the exceptor has done everything required of him by law to perfect his bill."

"In *Mitchell* v. *Commonwealth*, 140 Va. 572, the court at Page 577 stated in part as follows:

> "In *Lancaster* v. *Stokes*, 119 Va. 153, 89 S. E. 86, Judge Whittle says: "In *Conaway* v. *Commonwealth* (118 Va. 794, 88 S. E. 75), the bills of exceptions were tendered in time, though not signed until after the time limit had expired; yet the court held that the accused had acquired a right to have the bills of exceptions signed 'which she could have enforced by

> a writ of *mandamus* regardless of whether she applied for it before or after the thirty days expired. Therefore, the bills were held to be a part of the record."

"The Honorable Court of Appeals of this State has stated on numerous occasions that it was error for the Trial Judge to refuse to certify Bills of Exception and has reversed and remanded cases to the Trial Courts for such cause.

"In *Powell, who sues for, etc.* v. *Tarry's Adm'r.*, 77 Va. 250 at Page 263, the court stated in part as follows:

> "While *mandamus* will lie to compel a judge to certify the evidence when he shall so refuse, it is also error to so refuse, of which any party injured may complain to this court, and for which this court will reverse the judgment of the court below. It is the right of a suitor to have the evidence certified to this court in a case where the judge refuses to certify the facts proved, on the ground that the evidence is conflicting. To refuse to do so, is to deny the suitor his right of appeal."

"*Powell, who sues for, etc.* v. *Tarry's Adm'r.*, supra, is cited with approval in *Dillard & McCorkle* v. *Thomas Dunlop*, 83 Va. 755 at Page 761 and *Portner* v. *Portner's Exrs.*, 133 Va. 251, at 273.

"In *Lancaster* v. *Stokes*, 119 Va. 149 at Page 152, the court stated in part as follows:

> "So, *mandamus* will lie to compel the judge of an inferior court to sign a proper bill of exception which he has refused to sign at the trial, although final judgment has since been entered in the case, as the party has no other legal remedy; but if he refused to sign a bill certifying the facts or the evidence, because they have faded from his memory so that he cannot do so, the appellate court (while it cannot award a *mandamus*) will, upon proper proceedings had, grant the party aggrieved a new trial." Burks' Pl. & Pr., pp. 776, 777.

"We submit that it is not the intent of Rule 5:1, Sec. 3 (f), that anyone who has done all that is required of him can be deprived of his right to appeal by the failure of the trial judge to sign or certify a transcript.

"It is submitted that it is apparent that the part of the rule which provides for the delivery of the transcript to the clerk has been complied with as the clerk endorsed on the reverse side of Page 2 of the memorandum attached to the transcript "Received by me this 21st day of June 1960, Edward E. Young, deputy Clerk, Circuit Court, Fairfax, Va."

"Rule 5:1, Sec. 3 (f), second sentence, is as follows:

> "It shall be forthwith delivered to the clerk who shall certify on it the date he receives it."

Discussion of compliance with this part of Rule 5:1, Sec. 3 (f), has been covered immediately above.

"Rule 5:1, Sec. 3 (f), third sentence, is as follows:

> "Counsel tendering the transcript or statement shall give opposing counsel reasonable written notice of the time and place of tendering it and a reasonable opportunity to examine the original or a true copy of it."

"The purpose of requiring counsel tendering a transcript or statement is to give opposing counsel reasonable written notice of the time and place of tendering it is the same as that for the giving of notice to the opposing party of the tender of a bill or certificate of exceptions and the Honorable Court of Appeals of this state has stated: "What is a reasonable time depends upon circumstances and is usually determined by the trial judge, as the statute provides."

"In *Town of Falls Church* v. *Myers*, 187 Va. 110, at Page 114, the court stated in part as follows:

> "[1, 2] The purpose of this requirement is to give the opposing party or his attorney an opportunity

> to inspect the contents of the bill or certificate of exception in order that he may be certain that the truth is fairly stated and, if he does not think that the statements are correct, he may present his views to the trial judge before the subject matter is made a part of the record. What is a reasonable time depends upon circumstances and is usually determined by the trial judge, as the statute provides: "Before the judge shall sign any such certificate as mentioned above, it shall appear in writing that the opposing party or his attorney of record, shall have had reasonable notice of the time and place when such certificate shall be tendered * * *."

"The Honorable Judge of the Trial Court did not find that reasonable written notice of tender of the transcript had not been given but stated in the last paragraph of his memorandum "I do not certify that reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the original or a true copy of it was given to the Commonwealth's Attorney, *inasmuch as he objects to such notice*, as set forth in a statement filed with me by him on June 15, 1960." (Emphases supplied.)

"In the Trial Court the plaintiff in error was represented by an experienced attorney who had at one time been the Assistant Trial Judge of the Fairfax County Court and in whom the plaintiff in error was thoroughly justified in expecting to be properly represented. However, unfortunately, as is obvious from the transcript, plaintiff in error's counsel should have been a witness in his behalf and should not have participated in the trial of the case, which was through no fault of the plaintiff in error. Prior to the employment of Mrs. Miller, the aforementioned attorney withdrew from the representation of the plaintiff in error, and it is reasonable to assume that delayed the plaintiff in error to some extent in the perfection of his appeal. Mrs. Miller began representing the plaintiff in error on the 16th day of

May, 1960, and procured the services of two stenographers to transcribe the testimony taken at the trial upon a taperecorder, which transcription was completed and delivered to Mrs. Miller at 5:30 a.m., D. S. T., on Thursday, June 9, 1960, and she, on the same day, completed reading the transcript about 8:45 a.m. and went directly to the office of the Assistant Commonwealth Attorney, who was out and at approximately 1:00 o'clock p.m. of the same day she found him in his office and delivered to him a written notice that she would tender this transcript to the Judge at 10:00 o'clock, D. S. T., on the following day, June 10, 1960, at the Fairfax County Courthouse (R. 31) and at the same time delivered to him a copy of transcript. Mrs. Miller further made an affidavit to the fact that the first reading of the transcript with which she was unfamiliar, consummed between four and five hours. The 60th day after final judgment would have been on the Monday following the Friday on which the transcript was tendered and, if counsel for the plaintiff in error had awaited the last day on which the transcript could have been tendered, it is reasonable to believe that the Commonwealth Attorney's office would have been closed on both the intervening Saturday and Sunday and a very little more time would have been afforded the Commonwealth's Attorney to have examined the transcript and counsel for the plaintiff in error would have been subject to severe criticism if anything had happened to prevent her from tendering the transcript on the 60th day.

"Counsel for the defendant in error on and after the 10th day of June 1960, had an ample opportunity to examine, object to, and have the Judge of the Trial Court to settle the transcript as it appears from the memorandum attached to the transcript and signed by the Judge that he did not sign same until June 21, 1960, and it appears from a statement filed by the attorney for the defendant in error on June 15, 1960, that he had

fully examined the transcript and although the attention of both the court and the attorney for the defendant in error was called to the fact that he had not attempted to supply or correct any of the statements complained of, it does not appear that anything was done to settle the transcript prior to June 21, 1960.

"In Hyson v. Dodge, 198 Va. 792, counsel for one of the parties received a notice by mail sometime on Friday, the 10th day of February 1956, that the transcript would be tendered on Tuesday, February 14, 1956, and counsel objected on the grounds that he had not been given reasonable notice and that the transcript had not been made available to him for examination and made a motion to dismiss the appeal, which the court overruled.

"In *Snead* v. *Commonwealth*, 200 Va. 850 at Page 852, the court cites the case of *Bacigalupo* v. *Fleming*, 199 Va. 827 and at Pages 852 and 853 stated in part as follows:

> "In *Bacigalupo* v. *Fleming*, supra, counsel for the appellant delivered to opposing counsel a transcript of the evidence on March 19, 1957, and informed her that he would present it to the judge on March 22, which was the last day of the sixty-day period prescribed by the Rules. On the next day counsel for the appellee returned the transcript and informed counsel for the appellant in writing that he had not been given sufficient time to examine it. Counsel for the appellant, on the same day, gave written notice to counsel for the appellee that on March 22 at the designated time and place he would tender the transcript to the trial judge. The transcript was presented on March 22 and the trial judge fixed March 27 as the day for the correction of any errors that might be pointed out and the day on which he would sign the transcript. The transcript was signed by the trial judge on March 27, which was within the seventy-day period allowed by the Rules. *We held that under all the circumstances reasonable notice of the presentation of the* tran

> script to the judge had been given opposing counsel and a reasonable opportunity had been given her to examine the transcript. (199 Va. at pp. 835, 836, 102 S. E. 2d at pp. 326, 327.)" (Emphases added.)

"It is submitted that if the attorney for the defendant in error felt that the transcript did not fairly state the facts that he had ample time between the 10th day of June and the 21st day of June, 1960, to present his version of the facts to the Trial Judge and have a settlement of the transcript. An examination of the statement filed by counsel for the defendant in error on June 15, 1960 (R. 27, 28 & 29), shows that counsel for the defendant in error was thoroughly familiar with the transcript at that time and same was not signed by the Judge until 6 days later. Attention of the attorney for the defendant in error was called to the fact by the affidavit of Mrs. Miller filed on June 17, 1960 (R. 31), that if there were in fact questions and answers omitted that he should set forth what these were and, although the defendant in error's attorney complained about the transcript, no effort apparently was made to have same settled.

"We submit that under the circumstances the notice of the tender of the transcript was reasonable and that the attorney for the defendant in error had an ample opportunity to have same settled if he so desired.

Rule 5:1, Sec. 3 (f), sentences four and five, are as follows:

> "The signature of the judge, without more, will be deemed to be his certification that counsel had the required notice and opportunity, and that the transcript or statement is authentic. He shall note on it the date it was tendered to him and the date it was signed by him."

The Honorable Judge of the Trial Court in his memorandum attached to the transcript stated in part:

> "I do not certify that the transcript is authentic. There are numerous errors in material testimony and numerous omissions of material testimony. I have made no changes in the transcript because upon tendering it to me, counsel for the Defendant asserted that it was authentic, and that she intended to stand on it as tendered."

"It was the duty of the Judge of the Trial Court to settle and certify the transcript. While the testimony was not recorded by a court reporter, it appears that a very great percentage of the testimony must have been recorded by the tape recorder operated by counsel for the defendant in error and the stenographers who transcribed same certified that the transcription was true and correct transcription of the tape recording. Mrs. Miller filed an affidavit wherein she stated that access to the tapes upon which the testimony was recorded was not denied to the Judge or the Assistant Commonwealth Attorney (R. 31).

"The Honorable Judge of the Trial Court stated that he made no changes in the transcript because upon same being tendered to him by counsel for the plaintiff in error asserted that it was authentic and that she intended to stand on it as tendered and, in this connection, we submit that Mrs. Miller did not participate in the trial of the case in the Trial Court and she had no other alternative than to rely upon the tape recording, whereas both the Judge and the Attorney for the defendant in error were present throughout the trial and were in a position to correct the transcript if need be.

"The law is well settled that if the truth of the case be fairly stated in a Bill of Exceptions that it is the duty of the court to sign it and, if the truth of the case is not fairly stated, to proceed to settle the same and when settled to sign it.

"In *Dillard & McCorkle* v. *Thomas Dunlop*, 83 Va. 755, at Pages 762 and 763, the court stated as follows:

> "The second assignment of error asserts a proposition equally as true as the first. It is, that the circuit court erred in requiring, as a condition precedent to certifying the evidence, that counsel for plaintiffs and defendant must agree the statement of evidence. This was, in effect, to make the plaintiffs' right of appeal dependent upon the concurrence of the defendant's counsel as to what the evidence was, when all experience teaches us that counsel will disagree—and honestly disagree—in a majority of cases, which makes it the duty of the presiding judge to hear all the evidence, hold the scales of justice impartially, and to determine, when necessary, what the evidence was."

"And, in *Lancaster* v. *Stokes*, 119 Va. 149, at Pages 152 and 153, the court stated as follows:

> "In *Page* v. *Clopton*, Judge, 30 Gratt. (71 Va.) 415, the court ordered a peremptory writ of *mandamus* to issue, directing the respondent, on the tender of a bill of exceptions, "if the truth of the case be fairly stated in said bill, to sign it; and if the truth of the case be not fairly stated therein, to proceed to settle the same, and when settled, to sign [illegible]" *Collins* v. *Christian*, Judge, 93 Va. 1, 24 S. E. 47[illegible]; *Conaway* v. *Commonwealth*, supra."

"It is submitted that under the law as stated in *Powell, who sues for, etc.* v. *Terry's Adm'r.*, 77 Va. 250, and in *Lancaster* v. *Stokes*, 119 Va. 149, quotations from which appear on Pages 4 and 5 hereof, that the trial court erred in failing to sign and certify the transcript in question and it is requested that the judgment of the trial court be reversed and the case remanded for a new trial. However, such request is made without prejudice to the plaintiff in error to proceed under the writ of error if such request is denied."

Whether the doctrine of estoppel or the guarantee of a fair trial under due process of law is invoked the fact remains that proceedings below were in contravention

of adjudicated cases in this Court dealing with procedural fair play.

In *Miller* v. *United States*, 357 U.S. 301, 78 S. Ct. 1190, 2 L. ed. 2nd, 1332, 1340, this Court said in part:

> Insistence upon observance by law officers of traditional fair procedural requirements is, from a long point of view, best calculated to contribute to that end, (meaning achievement of a state of law and order), however much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short cut methods in law enforcement impairs its enduring effectiveness.

True, the case cited dealt with search and seizure but a defendant is not less denied his constitutional protection when such summary rejection of a transcript, as occurred in this cause, deprives him of determination of his writ of error upon its merits.

In Carter v. Illinois, 67 S. Ct., 216, 91 L. ed. 172, 329 U.S. 173, 175, this Court further stated:

> The solicitude for securing justice * * * embodied in the Due Process clause, is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. A State must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. Mooney v. Halohan, 294 U.S. 103. Questions of fundamental justice protected by the Due Process clause may be raised to use lawyers language, dehors the record.

REASONS RELIED UPON FOR ISSUANCE OF WRIT

Herein the Court below has decided the federal question of due process as provided in Amendment 14 to the Constitution of the United States, sic:

> * * * nor shall any State deprive any person of * * * liberty * * * without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.;

in a way to conflict with applicable decisions of this court; and has thus so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure from the accepted and usual course of judicial proceedings by a lower court as to call for an exercise of this court's power of supervision.

CONCLUSION

For the reasons hereinbefore stated, petitioner respectfully prays that this petition be granted and that Writ of Certiorari issue, directed to the Supreme Court of Appeals for the State of Virginia, commanding that Court to certify and send to this Honorable Court for its review and determination the proceedings hereinbefore narrated, to the end that the judgment and opinion of said Supreme Court may be reversed by this Honorable Court.

Petitioner further prays for such other and further relief in the premises as may seem meet and proper.

Respectfully submitted,

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